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ALEXANDER L. STEVAS,
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(2)

No. 83-773

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON,

Petitioner,

v.

MICHAEL JAMES ELSTAD,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOV. 7, 1983
CERTIORARI GRANTED MAR. 5, 1984

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The following opinions and orders have been omitted in printing this appendix, because they appear on the following pages of the printed petition for certiorari:

Opinion of the Oregon Court of Appeals, dated Feb. 16, 1983 ..... App-1

Order of the Oregon Supreme Court, dated Sept. 7, 1983 ..... App-7

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 23, 1981—Indictment filed in Circuit Court for Polk County, Oregon, accusing Elstad of burglary in the first degree.

c.Feb. 5, 1982—Elstad's motion to suppress evidence of his statements to police delivered to court (filed by clerk on Feb. 12).

Feb. 11, 1982—Trial to court. Elstad found guilty as charged.

Mar. 23, 1982—Amended trial order filed, denying motion to suppress evidence, entering finding of guilty, and continuing case for sentencing.

Apr. 14, 1982—Judgment entered. Elstad sentenced to imprisonment for not to exceed five years and ordered to make $18,000 restitution upon parole.

May 13, 1982—Elstad's notice of appeal filed.

Feb. 16, 1983—Opinion of Oregon Court of Appeals entered, reversing circuit court and remanding for new trial.

Apr. 18, 1983—State's petition for reconsideration or review filed.

Apr. 29, 1983—Order of Court of Appeals entered, denying reconsideration.

Sep. 7, 1983—Order of Oregon Supreme Court entered, denying review.

Nov. 7, 1983—State's petition for certiorari filed.

Mar. 5, 1984—Certiorari and Elstad's motion for leave to proceed *in forma pauperis* granted.

INDICTMENT

[filed December 23, 1981]

No. 29500

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR POLK COUNTY

STATE OF OREGON	)	
	)	
Plaintiff	)	ORS 164.225
	)	
vs.	)	INDICTMENT
	)	
MICHAEL JAMES ELSTAD	)	
	)	
Defendant	)	

MICHAEL JAMES ELSTAD, is accused by the Grand Jury of the County of Polk and State of Oregon by this Indictment of the crime of BURGLARY IN THE FIRST DEGREE in violation of ORS 164.225, committed as follows:

MICHAEL JAMES ELSTAD on or about the 12th day of December, 1981, in the County of Polk, and State of Oregon, then and there being, did unlawfully, feloniously and knowingly enter and remain in a building, to-wit: a dwelling located at 2144 37th NW, Salem, Polk County, Oregon, with the intent to commit the crime of theft therein, said act of the defendant being contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at Dallas, Oregon, this 23rd day of December, 1981.

[Signatures, indorsements, and names of witnesses examined before Grand Jury omitted in printing]

MOTION TO SUPPRESS EVIDENCE

[submitted *circa* February 5, 1982]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF POLK

STATE OF OREGON,	)	
	)	
Plaintiff,	)	No. 29500
	)	
vs.	)	MOTION TO SUPPRESS
	)	
MICHAEL JAMES ELSTAD,	)	
	)	
Defendant.	)	

COMES NOW the Defendant by and through Albert C. Depenbrock, of his Attorneys, and moves the Court for an Order suppressing certain evidence and requiring the District Attorney to advise his witnesses to make no mention of said evidence, all as follows:

I.

Any evidence that Defendant made a statement, or the substance of any statement made in the living room of his home, in the presence of Detective Paul Burke, PCSO, or other police officers on or about December 17, 1981, said statements being obtained in violation of Defendant's rights under the Fifth and Sixth Amendment of the United States Constitution, and Article 1, § 11, of the Constitution of the State of Oregon, as interpreted by the United States

Supreme Court in the case of *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed2d 694 (1966), and *State v. Neely*, 239 Or 487, 395 P2d 557 (1964), and subsequent cases.

II.

Any and all written or oral statements of Defendant to police officers obtained after the statement mentioned above, said statements being "fruit of the poisoned tree" and are in violation of his rights under the United States Constitution as interpreted by United States Supreme Court in the case of *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed2d 441 (1963), and Constitution of the State of Oregon as interpreted by the Oregon Court of Appeals in the case of *State v. Lloyd*, 22 Or App 254, 538 P2d 1278 (1975), and ORS 133.683.

Defense Counsel has had an opportunity to review police reports and it appears that police officers went to Defendant's residence on December 17, 1981, with a warrant for Defendant's arrest; identified themselves to Defendant's mother and found Defendant in his bedroom in his underwear, required Defendant to dress and to accompany them to the living room; questioned the Defendant about the burglary for which the warrant for Defendant's arrest had issued, and elicited Defendant's confession, all prior to advising Defendant of his "Miranda" rights.

Other statements obtained followed closely in time and though proceeded [*sic*] by "Miranda" rights, were elicited as a direct result of Defendant's prior statements.

A hearing is requested on this Motion. Estimated time of hearing is 20 minutes.

DATED this 5 day of February, 1982.

[Signature omitted in printing]

TRANSCRIPT OF TRIAL

(excerpt)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF POLK

[Title of case omitted in printing]

[February 11, 1982]

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* * * * *

MIKE McALLISTER,

thereupon called as a witness on behalf of the Plaintiff, first duly sworn, was examined and did testify as follows:

(DIRECT EXAMINATION BY MR. HALBLEIB [the prosecutor])

Q. Please state your name and spell your last name.

A. Mike McAllister, M-c-A-l-l-i-s-t-e-r.

Q. And you're a deputy sheriff for the Polk County Sheriff's office.

A. That's correct.

Q. Now, you've been in the courtroom, and you've heard the testimony, Mr. McAllister. In connection with the incident that's been discussed, have you had contact with Michael James Elstad?

A. Yes, I have.

Q. Where did that contact occur?

A. First time at his residence.

Q. Remember what day?

A. No, I don't recall the exact date.

Q. Do you remember about what time?

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A. I believe it was in the afternoon.

Q. You have a report that refers to that.

A. It was on the 17th, and it would have been during the day.

Q. The 17th of —

A. December.

Q. 1981.

A. '81, yes.

Q. And it was during the day. Were you in the company of anyone?

A. Deputy Paul Burke.

Q. First of all, where did you contact Mr. Elstad?

A. Into West Salem. I don't know the exact address up there. I don't recall it. It's the Elstad residence.

Q. It was his residence.

A. His parents' residence, but he resided there.

Q. Was there anyone home other than him when you contacted him the first time?

A. Yes, a lady answered the door who we identified as Mrs. Elstad.

Q. This would be his mother.

A. Yes.

Q. What happened when you and Deputy Burke arrived there?

A. We asked her if Mike was there, and she said yes,

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that he was in the house, in the bedroom at that time. I don't recall if she said he was sleeping or just in bed.

Q. And did you then enter the home?

A. Yes.

Q. And what happened after you entered?

A. We asked Mrs. Elstad which bedroom it was, and she showed us. We went in there and got Mr. Elstad dressed and out of bed. I took Mrs. Elstad to the kitchen area, and Mike Elstad went to the livingroom [*sic*] area with Deputy Burke.

Q. Now, what was your purpose in taking Mrs. Elstad in the kitchen area?

A. She was not completely aware of why we were there. Obviously creates some tension and stress for her when we take the young fellow out of bed, so I explained to her.

Q. What did you explain to her?

A. The fact that we were in possession of an arrest warrant for Michael Elstad because of a burglary of one of the neighbor's residence.

Q. Basically, what was your purpose for this explanation?

A. To keep from any conflicts with her or with Mike based on the fact that she had a right to know what was going on.

Q. And then I guess you're telling me at that point Michael Elstad was arrested, is that correct?

A. Yes.

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Q. And who placed him under arrest?

A. It would be a joint effort from both of us being with him, probably technically Deputy Burke.

Q. Now, while you were in that home, did you, yourself, have any conversations with Mr. Elstad?

A. None other than to ask him who he was and maybe something in the nature of how are things going.

Q. Okay. In your presence, did Deputy Burke have any conversation with him in the home?

A. There were some words exchanged, but I don't remember the exact conversation.

Q. And then I assume he was arrested, and where did you take him to?

A. To the rear seat of our vehicle and transported him back to the Sheriff's office.

Q. Was there any conversation with him during the transportation from there to — you said the Sheriff's office. I assume you mean Polk County Sheriff's office.

A. Yes.

Q. Any conversations with him in the transportation from there to the Sheriff's office?

A. Nothing that I recall out of the ordinary, just the weather and how are you doing, things of that nature.

Q. After arriving back at the Sheriff's office, then what happened?

[66]

A. Took him back to my office, myself and Deputy Burke. I advised him of his rights from a prepared rights card, and he agreed to talk to us at that point, and I typed out a statement.

MR. HALBLEIB: Now, may the witness be shown what's marked as Plaintiff's Exhibits 5 and 6 for identification.

THE CLERK: Plaintiff's Exhibits 5 and 6.

MR. HALBLEIB: Q. Look at 6 first. What is it?

A. It's a prepared card that our officers use for the Miranda rights.

Q. Have any signatures on it?

A. Yes, it does.

Q. Whose signatures appear on that card?

A. Mike Elstad and my signature.

Q. Okay. Now, did Mike Elstad sign that card in your presence?

A. Yes, he did.

Q. And is that his signature?

A. Yes, it is.

Q. And then the other signature on it is yours, is that correct?

A. Yes.

Q. Now, what basically does that card reflect? You said it was a standard Miranda rights card. What does it

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reflect?

A. He's aware of his basic Constitutional rights. Would you like them read off here?

THE COURT: May I inquire at this juncture, do you intend to introduce oral statements made by this defendant?

MR. HALBLEIB: Yes, we do.

THE COURT: Are you objecting to the admissibility of those?

MR. DEPENBROCK [defense counsel]: Any previous statements taint subsequent statements tainted by previous statements.

THE COURT: Are there other statements that were made by the defendant previous to this one?

MR. HALBLEIB: There was apparently comment made by the defendant prior to his arrest to Deputy Burke which would probably have some relevance here.

THE COURT: Are we in the in-camera hearing now on the admissibility?

MR. HALBLEIB: I think I can probably finish out the rights card first before we get into the in-camera hearing.

THE COURT: Very well.

MR. HALBLEIB: Q. Now, did he appear to understand those rights then?

A. Yes, he did.

Q. And then he signed that card.

A. Yes, he did.

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Q. Were there any threats made to him?

A. No.

Q. Any promises made?

A. No.

Q. Anybody else to the best of your knowledge make any threats or promises to him?

A. No.

Q. And then he voluntarily signed that card for you.

A. Yes.

MR. HALBLEIB: Your Honor, I'd offer the card in evidence.

MR. DEPENBROCK: No objection.

THE COURT: It will be received. Did you say you read the card to ' im?

WITNESS: Yes.

THE COURT: Very well.

MR. HALBLEIB: Q. Then following the signing of that card, then he gave you a statement, is that correct?

A. Yes, he did.

Q. And did you type that statement out?

A. Yes, I did.

Q. And did he then sign the statement?

A. Yes, he did.

Q. I'd ask you to examine what's been marked as Plaintiff's Exhibit #5 for Identification, ask what that is.

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A. That's a statement taken in my office between myself and Deputy Burke and Michael Elstad at about 1645 hours on December 17th, 1981, that's located in the Sheriff's office.[1]

Q. And was there anyone present when that statement was taken other than you and Mr. Burke and Mr. Elstad?

A. No.

Q. Were there any threats made to him?

A. No.

Q. Any promises made to him?

A. No.

Q. Anybody else make any threats or promises to the best of your knowledge?

A. No.

[1]This statement is reprinted at pp. 40-42, below.

Q. Now, to the best of your knowledge, was that statement given freely and voluntarily?

A. Yes.

MR. DEPENBROCK: Objection, move to strike. It's just a conclusion of the witness.

THE COURT: Sustain the objection.

MR. HALBLEIB: Q. I think you said you typed the statement out.

A. Yes.

Q. Did Mr. Elstad read the statement over then?

A. Yes.

Q. Did you read it to him as well?

[70]

A. I read most of it to him, because I had some mistakes in it and I wanted him to initial those, so I pointed them out to him.

Q. Did he then initial those mistakes in your presence?

A. Yes.

Q. Did he then sign that statement?

A. Yes.

Q. Did anybody else sign it?

A. Paul Burke and myself.

Q. Was Mr. Elstad's signature made in your presence?

A. Yes.

Q. And you recognize that signature as being his?

A. Yes.

Q. Do you recognize the signature of Paul Burke?

A. Yes.

Q. Was that made also in your presence?

A. Yes.

MR. HALBLEIB: Your Honor, I think that would be the foundation.

THE COURT: Are you going to offer the exhibit?

MR. HALBLEIB: I would offer it.

THE COURT: Show the exhibit to counsel, please.

MR. DEPENBROCK: I'd have an objection, and I'd want to call witnesses in support of my objection.

THE COURT: The objection goes to, you say, taint?

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MR. DEPENBROCK: I say this statement is a product of a previous statement taken of the defendant without the advice of his rights that was required, and under the law it should be excluded.

THE COURT: All right. You have any more testimony on this issue then, Mr. Halbleib?

MR. HALBLEIB: I have some testimony but not on that particular issue.

THE COURT: All right. Anything more of this witness on this issue?

MR. HALBLEIM: No, your Honor. I would offer that.

THE COURT: You have any cross-examination of this witness on this particular issue?

MR. DEPENBROCK: I'd prefer to talk to the other officer first.

THE COURT: All right. You may step down, Officer, if you will, please.

Call your next witness on this issue.

MR. HALBLEIB: We'd call Deputy Paul Burke.

- - -

PAUL BURKE,

thereupon called as a witness on behalf of the Plaintiff, first duly sworn, was examined and did testify as follows:

(DIRECT EXAMINATION BY MR. HALBLEIB)

[72]

Q. Please state your name and spell your last name for the record.

A. My name is Paul Burke, B-u-r-k-e.

Q. And are you a deputy sheriff with the Polk County Sheriff's office?

A. Yes, I am.

MR. HALBLEIB: Your Honor, I do have a couple of questions I would ask of Deputy Burke that have nothing to do with this issue. You want me to cover those now or wait?

THE COURT: You may and see if there's any objection. You may proceed.

* * * * *

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* * * * *

MR. HALBLEIB: Your Honor, let me ask one question, how the court wishes to proceed.

THE COURT: I'd like to confine this to the admissibility of the statements.

MR. HALBLEIB: At this point I'll go into that.

Q. Deputy Burke, if we can shift forward to the 17th of December, 1981, did you on that date have occasion to have contact with Michael James Elstad?

A. Yes. I did.

Q. And what were the circumstances?

A. Detective McAllister and myself went to the Elstad residence, which is approximately one block directly east of the Gross residence, knocked on the door. Mrs. Elstad answered the door. We asked if her son Mike was home. She stated

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that he was. We identified ourselves as police officers, advised her that Mike may have some very serious problems and we'd like to speak with him. She invited us into the residence, told us that Michael was in the bedroom.

At that point we asked her to show us which bedroom, which she did. We went to that bedroom. Michael was laying in bed dressed in either a pair of shorts or gym shorts, I don't recall which.

We asked Mike to get up. He was listening to the stereo. He got up, dressed himself and came out to the living room area.

Q. Okay. Now, did Deputy McAllister at that time take Mrs. Elstad to another portion of the house?

A. Deputy McAllister took Mrs. Elstad to the kitchen area, which is only basically — I don't know, ten or twelve feet from the livingroom [*sic*] area, to advise her of just what the situation was.

A. Okay. Now, after getting Mr. Elstad out of bed, you said you brought him to the livingroom [*sic*] area of the house.

A. Yes.

Q. And was he allowed to dress before he came out?

A. Oh, yes!

Q. After getting in the livingroom [*sic*] area of the house, what happened?

A. I sat down with Mr. Elstad and I asked him if he

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was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross

house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, "Yes, I was there."

Q. And then what did you do?

A. Had Detective McAllister take him to the rear of the patrol unit, advised Mrs. Elstad that he would be taken to Polk County Sheriff's office in Dallas and she could find out any information regarding bail at that time.

Q. So the only statement that he made to you at that time was yes, he was there.

A. That's correct.

Q. Did you make any further inquiry of him?

A. I did not. At that time I talked to Mrs. Elstad in the house for approximately a minute to a minute and a half, and at that point Mr. Elstad drove up into the driveway or up into the street up in front of the house.

At that point Mrs. Elstad and myself went out to see her husband. I advised Mr. Elstad of what I had just told to Mrs. Elstad.

He at that point went to the rear of the patrol unit where Mike Elstad was and opened the rear door and had a

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conversation with him.

Q. Did you overhear that conversation?

A. Yes, I did.

Q. What was the conversation?

A. Mr. Elstad told his son that "I told you that you were going to get in trouble. You wouldn't listen to me. You never learn." And he became quite agitated to the point where I basically stepped between Mr. Elstad and the car and asked him to step back.

Q. Did Michael Elstad make any response to his father's comments?

A. He said a few words. I don't quite recall what they were. He acknowledged the fact that his father was angry, and I can't tell you his exact words. I don't recall.

Q. From that point you took him to the Sheriff's Department, is that correct?

A. That's correct.

Q. And once you arrived at the Sheriff's Department, what did you do? Where did you go?

A. To Deputy McAllister's office.

Q. At Deputy McAllister's office what did you do?

A. Deputy McAllister advised Mr. Elstad of his rights from a card, asked him if he understood those rights. The answer was affirmative.

Q. Did he sign a rights card?

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A. Yes, Mr. Elstad signed the card, and Deputy McAllister signed the bottom line.

Q. And then after that, what happened?

A. Mr. Elstad gave a statement as to what occurred on the 11th of December of that year. And at the time he was giving this statement orally, Deputy McAllister was typing it.

Q. Do you have Exhibit 5 in front of you?

A. Yes, I do.

Q. Okay. I'd ask if you recognize that.

A. Yes.

Q. And what is it?

A. It is a statement taken at 1645 hours, which would be 4:45, on December 17th. The location was McAllister's office. Present were McAllister, myself and Michael Elstad. And it is a two page statement, typed, pertaining the [*sic*] the events that took place on the — on Friday the 12th — the 11th of December.

Q. Now, after that statement was typed out, was it signed in your presence?

A. Yes, it was.

Q. And who was it signed by?

A. Signed by Michael Elstad, by McAllister and myself.

Q. Were there any corrections initialed on it?

A. Yes, there are several typographical errors which are initialed, misspelled words, etc. There is also a

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parenthesized, handwritten paragraph in the bottom which was an afterthought that is also initialed.

Q. And who wrote the handwritten paragraph?

A. It appears to be McAllister's handwriting, and I was present when the statement was made by Mr. McAllister [*sic*].

Q. Now, let's go back now to the arrest. At any time prior to the arrest, did you make any threats to Mr. Elstad?

A. No

Q. Did you make any promises?

A. No promises.

Q. Did you ask him any more about the burglary than what you just related?

A. Not until we arrived at the office.

Q. Okay. Did Mr. McAllister ask him anything about a burglary?

A. To my recollection, there was no questioning at all on the ride back regarding the burglary.

Q. Was there any question by Mr. McAllister at the house?

A. Not to my recollection.

Q. Okay. Was there any threats or promises made by anybody at the house?

A. There was not.

MR. HALBLEIB: Your Honor, I would offer #5 again. I think that would be the basis of the state's testimony on

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this matter.

THE COURT: It's twelve o'clock, we'll recess for lunch. You may step down if you will, Officer. I have another matter at one o'clock. It will take about 30 minutes I'm told. We'll recess this trial until 1:30.

(NOON RECESS TAKEN)

THE COURT: You may proceed.

MR. HALBLEIB: Q. Deputy Burke, there's one question that I neglected to ask you earlier. After you had picked or after you arrested Mr. Elstad, you indicated you'd gone back to the Polk County Sheriff's office. Was that a direct trip back or were you diverted somewhere?

A. It was not a direct trip back, we were diverted. Approximately 30 to 40 seconds after leaving the Elstad residence, we received a robbery call on Augusta Street in West Salem. We were the closest unit, so we responded to that robbery with Mr. Elstad in the rear seat of the car.

Q. Was there any conversation with Mr. Elstad on that or anything else?

A. The only conversation at that time was between the radio dispatcher and our unit.

MR. HALBLEIB: We have no other comments. I think that was the only question that I had.

- - -

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(CROSS-EXAMINATION BY MR. DEPENBROCK)

Q. Detective Burke, how long have you been employed by the Polk County Sheriff?

A. Just about three years.

Q. Why was it that you went to Mike Elstad's home on December 17th?

A. To arrest Mike Elstad.

Q. And you had with you a warrant for his arrest, did you not?

A. Yes, we did.

Q. You went to the door, his mother answered. You told her you were police officers I take it, identified yourselves.

A. That's correct.

Q. His mom led you to him in his bedroom.

A. Yes, sir.

Q. Was the door open or closed?

A. I don't recall. The best of my recollection, Mrs. Elstad went first, Detective McAllister was second, and I was third, and I can't really say whether the door was open or closed.

Q. Mike under the covers or was he laying on the bed or what was he doing?

A. He was laying on the bed. He did have, I believe, a sheet or a blanket over him or at least midway. He was bare from the shoulders to the chest.

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Q. Before anything was said between anybody, did his mother leave the room or was she still present?

A. I don't recall.

Q. Okay. Do you recall who was the first to initite any conversation?

A. I believe I asked him or McAllister asked him, I'm not sure which, to please get up and get dressed and come out in the other room.

Q. You don't remember if his mother was present then or not.

A. I believe she was but I'm not completely certain. I believe she was standing either in the doorway or she had gone back into the livingroom [*sic*] area.

Q. Did you identify yourself to him as a police officer?

A. Yes.

Q. Did you ask him his name?

A. Yes.

Q. You told him to please get dressed.

A. Yes.

Q. Did you stay in the room while he dressed?

A. Yes, we did.

Q. Both of you?

A. Yes.

Q. Did you tell him he was under arrest?

A. Not in the bedroom, no.

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Q. Did you tell him he was not under arrest?

A. No.

Q. In fact he was under arrest, was he not?

A. Yes.

Q. When you left, you walked to a hallway I take it, a short hallway to the livingroom [*sic*].

A. Yes, a very brief — I don't know, a matter of 10 or 15 feet possibly, 12 feet.

Q. Okay. Did you have your hands on him at that time?

A. I did not.

Q. One in front, one in back, escorting him?

A. I can't answer that, I'm not sure. I believe I went out to the living area first, and Mr. Elstad and McAllister was at the rear, but I'm not complete [*sic*] certain.

Q. You got to the livingroom [*sic*] and was his mother still there, still with you, or had she already gone to the kitchen?

A. As soon as we got to the livingroom [*sic*], Detective McAllister asked Mrs. Elstad to step to the

kitchen area with him, and Michael sat down on, I believe, the sofa.

Q. And where did you sit down or did you sit?

A. I don't believe I sat. I believe I stood.

Q. Did you hear Detective McAllister tell Mike's mom that there was — that you had a warrant for his arrest?

A. I don't recall hearing it. I know that at a little bit later in the conversation I did tell her.

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Q. Okay. Before or after you talked to Mike?

A. After.

Q. You stood up, then you initiated some conversation, you spoke next, did you?

A. Pardon me?

Q. You got to the living room.

A. Yes.

Q. Defendant sat down and you stood up.

A. Yes.

Q. And then you initiated — you said something.

A. Yes, I did, I said, "You know why we're here."

Q. And what was his repsonse to that?

A. His response was no, he did not know why we were there.

Q. And what did you say following that?

A. I asked him if he knew a Mr. Gross.

Q. That was your exact words, "Do you know Mr. Gross?"

A. It may not have been the exact words, but it was basically the exact words. I may have said do you know the Gross family or do you know Mr. Gross or very similar words to that effect.

Q. Did you say anything like I have reliable information that you're involved in a burglary?

A. I don't recall that.

Q. And in response to your question to him as to

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whether or not he knew Mr. Gross, what, if anything, did the defendant say or do?

A. He looked around a little bit toward the kitchen to where his mother was and looked back at me and fidgeted just a bit and said he had heard about the burglary.

Q. Okay.

A. And I asked what he knew about the burglary, and he said, "I was there."

Q. You asked him what do you know about the burglary?

A. Yes.

Q. Okay. At any time prior to making any of these statements or hearing anything of the defendant, did you advise him of his rights, what are commonly known as Miranda rights?

A. Not at that point.

Q. And by Miranda rights I mean those same rights that were on the printed card that I think has been admitted as State's Exhibit 5.

A. That's correct, I understand what you mean.

Q. Okay. You mentioned earlier that you overheard some conversation between the defendant's father and the defendant.

A. Yes.

Q. Prior to that, had you advised him of his rights?

A. Had I advised him?

[85]

Q. Had anyone?

A. I had not, and I don't know — Detective McAllister took Mr. Elstad from the house to the vehicle, and I remained inside with Mrs. Elstad, speaking with her, at which time I told her that yes, we had an arrest warrant, that her son was in custody and why and where she could check for bail or whatever.

Q. Okay. And when was the first time that you, if you did, advised Mr. Elstad of his rights? When was that?

A. I never did. McAllister did in my presence, the first I was aware of it, at his office later that afternoon.

Q. That would have been after the ride in the car.

A. That is correct.

Mr. DEPENBROCK: No further questions.

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(REDIRECT EXAMINATION BY MR. HALBLEIB)

Q. If I understand that correctly, Deputy Burke, the only exchange of questions that occurred between you and Mr. Elstad were the ones you related.

A. Yes

Q. Where you asked him if he knew Mr. Gross.

A. Yes.

Q. And asked him what he knew about the burglary.

A. Yes.

MR. HALBLEIB: I'd have no further questions.

[86]

(RECROSS-EXAMINATION BY MR. DEPENBROCK)

Q. With the exception of the statements that we talked about in the livingroom [*sic*], the defendant's statements which you might have overheard — I think you said you acknowledged that his father was mad at him, so disregard that. With the exception of the statements made in the livingroom [*sic*] and the formal written statement, was there any other statement made by the defendant to you regarding this case in any way?

A. Was there any other statement made by him to me? I'm not sure I understand what you're asking me.

Q. Strike the whole question. I think you probably answered it. You told me you didn't say anything on the way in. I suppose if anything comes up we can deal with it at such time.

No further questions.

MR. HALBELEIB: I have no further questions of Deputy Burke concerning this matter. I have questions concerning other matters.

- - -

(EXAMINATION BY THE COURT)

Q. Officer Burke, how much time or space involved between the first time you talked to this man in the living room and the time he was advised of his rights in the Sheriff's office? How many miles and how much time was involved?

A. Your Honor, what happened was we were transporting

[87]

him back to the Sheriff's office. We got the radio call regarding the robbery which we had to respond to. We went straight to the Augusta Street location. We left Mr. Elstad in the back of the car.

Detective McAllister took the rear of the house, and I took the front of the house so I could watch the house and the car at the same time.

Other units arrived, and we arranged for another unit to transport Mr. Elstad to the jail. And we stayed there conducting interviews perhaps as much as 45 minutes or an hour may have passed before McAllister and myself got back here to the Sheriff's office and began the interview with Mr. Elstad.

Q. Who in fact transported him to the —

A. I believe it was Corporal Peters.

THE COURT: All right.

MR. HALBLEIB: I have no more witnesses on this issue.

MR. DEPENBROCK: I'd like to question Detective McAllister briefly, your Honor.

THE COURT: Very well. Step down, Officer, please.

You've already been sworn, haven't you? Just have a chair.

MR. HALBLEIB: He's already been on the stand on the same issue.

[88]

THE COURT: Yes, right.

(DIRECT EXAMINATION BY MR. DEPENBROCK)

Q. You've heard the testimony of Detective Burke, do you recall any other initial Miranda rights given to the defendant other than those given at the station?

A. No, I don't believe so.

Q. Do you remember any other statements being made? Did you hear any other statements made by the defendant other than those that Detective Burke has referred to in the living room and the formal statement made by the defendant at the station?

A. I didn't hear those made in the livingroom [*sic*].

Q. Did you hear of any others?

A. No.

Q. The substance of what Detective Burke says, happenings at the defendant's house, does that agree with your recollection?

A. Yes.

MR. DEPENBROCK: No other questions.

MR. HALBLEIB: No other questions.

THE COURT: You may step down.

You have witnesses you want to call now on the in-camera hearings?

MR. DEPENBROCK: Not now, but I'd like to briefly argue the point.

[89]

THE COURT: All right.

MR. DEPENBROCK: I submitted my memorandum.

THE COURT: I read it.

MR. DEPENBROCK: And I think that based upon the memorandum and the testimony of witnesses that there's no question there was interrogation without the Miranda rights. And the officer testified he was under arrest. He was in custody, and he asked him things which were clearly interrogation.

A fairly recent case is that case of Rhode Island versus Innis [446 U.S. 291 (1980)] I believe, which says that anything out of the ordinary and the police should know it was readily likely to elicit an incriminating response, not just expressed questioning but any words or actions.

Seems to me like the proper procedure would have been once he had the defendant's name to tell him you are under arrest and you have a right to remain silent. Anything you say can and will be used against you, so on and so forth.

That wasn't done. Because of that, that statement in the livingroom [*sic*] and those statements which followed in the brief time thereafter should be suppressed.

That Mendacino case [*State v. Mendacino*, 288 Or. 231, 603 P.2d 1376 (1979)] is right on point on the

subsequent statements. They had previous tainted statements. They had the fellow in custody for 72 hours. He was advised of his rights prior to the subsequent statement. The

[90]

subsequent statement was taken by somebody else. The cat had already been let out of the bag. So I think if the first is bad, I think the second is bad.

THE COURT: Anything the State wants to say about this matter?

MR. HALBLEIB: Basically, your Honor, probably State versus Brewton [238 Or. 590, 395 P.2d 874 (1964)] is what we're talking about. The burden of proof is on the State to show the voluntariness to the satisfaction of the court.

We have two questions here, and Mr. McAllister indicated that he separated the two, and they were explained to him before they actually, physically arrested him — to the mother to avoid any confrontation.

The only statement that I have seen or heard come out of that was the statement to the effect of I was there, which doesn't say much of anything at all.

He was arrested and then transported and finally read his rights at the Sheriff's office, and then and

only then was there any questioning going on of the burglary and details, and I think that's perfectly permissible.

THE COURT: May I see Exhibit 6, please. Exhibit 6 has been received, hasn't it?

MR. HALBLEIB: Yes, it has, your Honor.

THE COURT: Mr. Depenbrock, this goes to the admissibility of State's Exhibit 5, is that where we are?

[91]

MR. HALBLEIB: That's where we are.

THE COURT: I'm going to deny the motion to suppress Exhibit #5 for these reasons: I'm of the view that the statements made by the defendant at the house in response to the officer's question: "What do you know about the robbery?" must be suppressed. It would not be admissible because this man was not advised of his Miranda warnings, his Constitutional rights.

However, the statement taken at the jail would be admissible because the evidence shows that there was no taint between the first statement "I was there" and the second. I have not seen the contents of the second statement, but assuming that there is incrimination [*sic*] evidence, statements in that written document, that would be admissible.

There was a break in the events from 45 to 50 minutes away from the courthouse and being transported by the police officer, and I think the taint — there's no showing of any taint whatsoever.

There is a showing by the State that the statements were made freely and voluntarily. The rights card is in evidence. The officer read the rights to him. They are numbered one through seven. They appear on Exhibit #6, and on the reverse side is the question: "Do you understand these rights" And the word y-e-h appears after that, which I assume is yes. "Do you have any questions about your rights?" Answer: "No."

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"Having these rights in mind, do you wish to talk to us now?" And it says, "Y-e-h, I do."

And I find that the State has established that the statement was given freely and voluntarily and knowingly and will not suppress Exhibit #5.

MR. DEPENBROCK: Thank you, your Honor. Might I add one request, that the statement be admitted in the proceeding we just had to determine its admissibility? You said you had not seen it, and I overlooked that point. May I ask the Court to reconsider its ruling after reading the statement?

THE COURT: All right.

MR. DEPENBROCK: Thank you, your Honor.

MR. HALBLEIB: Just one other point of clarification, your Honor. The state has never offered the statement made between the arrest and the rights and did not intend to make an offer.

THE COURT: I realize that.

All right, now we'll get back to the trial of the case. * * *

EXHIBIT 5: ELSTAD'S STATEMENT

DECEMBER 17, 1981

TIME: 1645 hours
LOC: office (mCAllister's) [*sic*]
PRESENT: MIKE MCALLISTER, PAUL BURKE, & MICHAEL ELSTAD

I, Michael Elstad make the following statement after being advised of my rights per a prepared rights card and acknowledging such rights and wish to speak to the above officers about the burglary and my involvment [*sic*] at the Gross residence.

On Friday 12-11-81 Jeff Radley and myself went to Robert Miller's residence out in the Keizer area. I have known Robert since I went to school at McNary HIgh [*sic*] School with him. The reason that I was with Jeff is that he had his mother's car (a white over dark brown car I beleive [*sic*] a Buick) and he drove me to Robert's house. When we were at Robert's house I told him I knew a house that the people were not home at and they had a lot of nice furniture. Robert said that he knew a person that could use the furniture AND that I should go see Robby Gray; and he gave me the address (Apt B in the Comstock Apts, "Go down Market Street past Lancaster to the Comstock Apts,)"

Jeff and myself went and told Robby about the house and Robby gave each of use [*sic*] twenty-five

dollars (in cash). Robby said that he would like to go look at the house and look at it. Jeff and I then left and Jeff took me home and I beleive [*sic*] that he went home.

Robby Gray called about 1530 hours or 1600 hours (3:30 or 4:00) and said he would be coming up to look at the house.

At about 1600 hours (4:00) a brown and lighter colored brown van drove by and I went out to see if it was Robby. I walked down to a turn around in the road and Robby was already standing in the road waiting for me. I then got in the van and found that tve [*sic*] driver was a person that I know by "Pat", and another guy sitting in the passenger seat (blond curly hair, 5/8, 140 lbs.) We then drove by the Gross's house and Robby and I got out of theh [*sic*] van and walked back to the house and I then opened the sliding glass door by moving it up and down. Robby and I then went in the house and Robby picked up a camera in a brown case and we both left. I then told Robby that he should come back in the night and he said that they would go back to his house and come back later.

I then walked home and did not know anymore [*sic*] about the burglary until Robby called me a couple of days later and that he had heard that his name had been mentioned and that he was going to leave.

Robby also said that he did not want any of the stuff and I told him that I did not want any of it any [*sic*] that I did not want anything to do with it.

Taken by /s/ Mike McAllister /s/ Paul Burke

No Furhter [*sic*] knowledge & the end of statment [*sic*]. /s/ Mike Elstad

[Handwritten addendum:] "After leaving the house Robby & I went back to van & Robby handed me a small bag of grass" M.J.E.

AMENDED TRIAL ORDER

[filed March 23, 1982]

No. 29500

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR POLK COUNTY

STATE OF OREGON,	)	
	)	
Plaintiff,	)	
	)	AMENDED TRIAL ORDER
vs.	)	
	)	
MICHAEL JAMES ELSTAD,	)	
	)	
Defendant.	)	

The above entitled matter came regularly before the Court, the Honorable Darrell J. Williams presiding on the 11th day of February, 1982, the defendant appearing in person, and with his attorney, Albert C. Depenbrock, and the plaintiff appearing by Duane W. Halbleib, Deputy District Attorney for Polk County, Oregon, this having been the time set for the defendant's trial upon an Indictment charging him with the crime of BURGLARY IN THE FIRST DEGREE.

Prior to commencement of trial the defendant indicated to the Court that he desired to waive his right to have the matter tried by jury and the Court questioned the defendant and determined that such waiver was being made freely, knowingly and

voluntarily in all respects and the Court thereupon allowed the defendant to execute in open Court a written waiver of jury trial.

Opening statements of counsel were waived and witnesses were called and examined on behalf of the plaintiff. The defendant made objection to entry of a written statement by the defendant concerning the matter being tried before the Court and the matter was heard on defendant's objection and motion to suppress the written statement in an *in camera* hearing. Thereafter the Court found that Polk County Sheriff's Deputies had gone to the defendant's house armed with an arrest warrant and that the defendant, before being arrested, but while in custody, had been asked what he knew about the burglary and the defendant had responded that he was there; the Court finding that this particular statement would not be admissible because the defendant had not been advised of his Miranda rights before the question had been asked by the Sheriff's Deputies. The Court then further found that under the facts presented the defendant had been arrested and transported to the Polk County Sheriff's Office where he had been properly adivsed [*sic*] of his Miranda rights and had in fact signed a card acknowledging those rights. That after the defendant had acknowledged those rights the defendant then, at that time, consented to give a

statement to Polk County Sheriff's Deputies concerning the burglary in question. The Court further found that his written statement was given freely, voluntarily and knowingly by the defendant after he had waived his right to remain silent and have counsel present which waiver was evidenced by the card which the defendant had signed. The Court further found that his second written statement was not tainted in any way by the previous brief statement between the defendant and the Sheriff's Deputies that had arrested him. After making these findings, the Court then ruled that the defendant's objection to entry of the written statement would be overruled and the defendant's Motion to Supress [*sic*] such written statement would be denied. The defendant thereafter rested without calling witnesses and closing arguments of counsel were waived. The Court then determined that the State had proven the defendant guilty of the crime of BURGLARY IN THE FIRST DEGREE beyond a reasonable doubt and to a moral certainity [*sic*] and the Court thereupon found the defendant guilty of the crime as charged.

The Court then found that a presentence investigation should be ordered and directed that the State of Oregon Corrections Division/Polk County Community Corrections shall make the presentence investi-

gation and thereafter the Court being fully advised in the premises:

IT IS, THEREFORE, ORDERED that the Court shall and does find the defendant Guilty of the crime of BURGLARY IN THE FIRST DEGREE and that such verdict shall be and is hereby entered in record herein, and

IT IS FURTHER ORDERED that the State of Oregon Corrections Division/Polk County Community Corrections shall conduct a presentence investigation on the above name [*sic*] defendant and shall submit a report of the same to the Court, and

IT IS FURTHER ORDERED that the matter shall be continued for sentencing pending the receipt of the presentence investigation.

Dated at Dallas, Oregon, this 23rd day of March, 1982.

[Signature omitted in printing]

JUDGMENT

[filed April 14, 1982]

No. 29500

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR POLK COUNTY

STATE OF OREGON, Plaintiff, vs. MICHAEL JAMES ELSTAD, Defendant.	)	SENTENCING ORDER

The above entitled matter came regularly before the Court on the 12th day of April, 1982, the Honorable Darrell J. Williams presiding, the defendant appearing in person and with his attorney, Albert C. Depenbrock, and the plaintiff appearing by Duane W. Halbleib, Deputy District Attorney for Polk County, Oregon, this having been the time set for the defendant's sentencing upon the defendant's conviction for the crime of BURGLARY IN THE FIRST DEGREE.

The Court inquired of the defendant as to whether the defendant had seen the presentence report and the defendant replied that he had and that certain material contained in the report was inaccurate and the Court after hearing the defendant

informed the defendant that the material contained in the report would be considered in light of the defendant's statement.

The Court then heard statements of respective counsel and offered the defendant an opportunity to make a statement on defendant's own behalf and at the conclusion thereof the Court being fully advised in the premises:

IT IS, THEREFORE, ORDERED that upon the defendant's conviction for the crime of BURGLARY IN THE FIRST DEGREE the defendant shall be committed to the legal and physical custody of the State of Oregon Corrections Division for a maximum term of five (5) years for the reasons enumerated in the Court record but not set out in this order would show that the defendant can only be rehabilitated in a facility available to the Corrections Division. It is recommended by the Court to the Corrections Division that due to the defendant's age that the defendant be allowed to serve this sentence in the Oregon State Correctional Institution.

IT IS FURTHER ORDERED that upon parole the defendant shall make restitution to the Clerk of this Court in the amount of $18,000.00 for damages sustained as a result of the defendant's criminal activity, such payments shall be made in payments of not less than $300.00 per month until the entire sum of restitution is paid in full. Such restitution

shall be forwarded by the Clerk of the Court to Gilbert Gross, the victim of the crime whose address shall be furnished to the Clerk of the Court by the Polk County Release Assistance Officer, and

IT IS FURTHER ORDERED that the defendant having not waived his right to remain in the Polk County Jail for at least 48 hours after the pronouncement of sentence shall not be transported to the facility of the Corrections Division of the State of Oregon to begin serving defendant's sentence until after 11:30 a.m. on April 14 1982.

Dated at Dallas, Oregon this 14th day of April, 1982.

[Signature omitted in printing]

OPINION OF OREGON COURT OF APPEALS

[Opinion set forth in full as Appendix A, pages App-1 through App-6 of the printed petition for certiorari]

ORDER OF OREGON SUPREME COURT DENYING REVIEW

[Order set forth in full as Appendix B, page App-7 of the printed petition for certiorari]